Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Public Utility District No. 1 of
Pend Oreille County, Washington,

Petitioner,

v.

United States of America, and
Kalispel Tribe of Indians,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

NINTH CIRCUIT COURT'S ORDER DENYING PETITION FOR REHEARING
Filed September 14, 1994 . . . . . 1a

DECISION OF NINTH CIRCUIT COURT OF APPEALS Filed July 14, 1994 [28 F.2d 1544] 4a

NINTH CIRCUIT COURT'S SCHEDULING ORDER RE: ORDINARY HIGH WATER MARK AND ABORIGINAL TITLE Filed May 26, 1988 . . . . . 26a

NINTH CIRCUIT COURT'S ORDER RE: COURT HEARING APPEAL IN PHASES
Filed July 3, 1989 . . . . . 30a

DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW and JUDGMENT
Filed August 10, 1987 . . . . . 33a

FEDERAL POWER COMMISSION'S ORDER APPROVING REVISED PROJECT EXHIBITS
Filed March 18, 1963 [29 FPC 534] 47a

FEDERAL POWER COMMISSION'S ORDER APPROVING EXHIBIT AND PRESCRIBING ANNUAL CHARGES Filed October 3, 1956 [16 FPC 1008] 50a

FEDERAL POWER COMMISSION'S ORDER ISSUING LICENSE (MAJOR)
Filed February 5, 1952 [11 FPC 786] 53a

R.D. Searles, Acting Secretary of the Interior, Letter of January 18, 1952 to Hon. Thomas C. Buchanan, Acting Chairman, Federal Power Commission 67a

Assistant U.S. Attorney letter of February 22, 1988 stating that United States will not designate any part of the transcript for the appeal 76a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff-Appellee, and KALISPEL INDIAN TRIBE, Intervening-Plaintiff, v. PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corp., Defendant, and DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant-Intervenor-Appellant.	)	No. 88-3617 D.C. No. CV-80-116-JLQ **FILED SEPT. 14, 1994**
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff-Appellee, and KALISPEL INDIAN TRIBE, Intervening-Plaintiff, v. PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corp., Defendant-Appellant, and DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON,	)	No. 88-3618 D.C. No. CV-80-116-JLQ

Defendant-Intervenor.	)
	)
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees,	) No. 88-3619
Plaintiff-Appellant,	)
and	) D.C. No.
KALISPEL INDIAN TRIBE,	) CV-80-116-JLQ
Intervening-Plaintiff,	)
v.	)
PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corp.,	)
Defendant-Appellee,	)
and	)
DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON,	)
Defendant-Intervenor.	)
	)
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees,	) No. 88-3669
Plaintiff,	)
and	) D.C. No.
KALISPEL INDIAN TRIBE,	) CV-80-116-JLQ
Intervening Plaintiff-Appellant,	)
v.	)
PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corp.,	)
Defendant-Appellee,	)
and	)
DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON,	)

Defendant-Intervenor-Appellee.	)	
	)	
UNITED STATES OF AMERICA,	)	No. 92-35504
Plaintiff,	)	
and	)	
KALISPEL INDIAN TRIBE,	)	D.C. No.
Plaintiff-Intervenor-Appellant,	)	CV-80-116-RMB
v.	)	
PEND OREILLE PUBLIC UTILITY	)	
DISTRICT NO. 1, a municipal corp.,	)	
Defendant-Appellee,	)	
and	)	**ORDER**
DEPARTMENT OF NATURAL	)	
RESOURCES, STATE OF	)	
WASHINGTON,	)	
Defendant-Intervenor-Appellee.	)	
	)	

Before: BROWNING, SCHROEDER, and FLETCHER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES of America, as trustee for the
Kalispel Indian Tribe and individual allottees,
Plaintiff-Appellee,
and
Kalispel Indian Tribe, Intervening-Plaintiff,
v.
PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1,
a municipal corp., Defendant,
and
Department of Natural Resources, State of Washington,
Defendant-Intervenor-Appellant.

UNITED STATES of America, as trustee for the
Kalispel Indian Tribe and individual allottees,
Plaintiff-Appellee,
and
Kalispel Indian Tribe, Intervening-Plaintiff,
v.
PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1,
a municipal corp., Defendant-Appellant,
and
Department of Natural Resources, State of Washington,
Defendant-Intervenor.

UNITED STATES of America, as trustee for the
Kalispel Indian Tribe and individual allottees,
Plaintiff-Appellant,
and
Kalispel Indian Tribe, Intervening-Plaintiff,
v.
PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1,
a municipal corp., Defendant-Appellee,
and
Department of Natural Resources, State of Washington,
Defendant-Intervenor.

UNITED STATES of America, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff,

and

Kalispel Indian Tribe, Intervening Plaintiff-Appellant,

v.

PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corp., Defendant-Appellee,

and

Department of Natural Resources, State of Washington, Defendant-Intervenor-Appellee.

UNITED STATES of America, Plaintiff,

and

Kalispel Indian Tribe, Plaintiff-Intervenor-Appellant,

v.

PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corp., Defendant-Appellee,

and

Department of Natural Resources, State of Washington, Defendant-Intervenor-Appellee.

Nos. 88-3617 through 88-3619, 88-3669, 92-35504.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 12, 1993.

Decided July 14, 1994.

Elizabeth Ann Peterson, U.S. Dept. of Justice, Washington, DC, for plaintiff-appellee-appellant.

Allen H. Sanders, Evergreen Legal Services, Seattle, WA, for plaintiff-intervenor-appellant.

Jerry K. Boyd, Spokane, WA, for defendant-appellant-appellee.

J. Lawrence Coniff, Asst. Atty. Gen., Olympia, WA, for defendant-intervenor-appellant-appellee.

Appeals from the United States District Court for the Eastern District of Washington.

Before: BROWNING, SCHROEDER, and FLETCHER Circuit Judges.

JAMES R. BROWNING, Circuit Judge:

This is the second opinion of this court dealing with issues arising out of a judgment entered by the district court in an action brought by the United States on behalf of the Kalispel Indians against the Public Utility District No. 1 of Pend Oreille County, Washington. The Federal Power Commission issued a license to the Utility to build and operate the Box Canyon Dam on the Pend Oreille River, which forms the western boundary of the Kalispel Indian

Reservation in northeastern Washington.[1] The United States filed suit alleging the Utility had flooded Reservation land and seeking damages and injunctive relief. The Kalispel Indian Tribe and the State of Washington intervened. The Tribe joined the trespass claims advanced by the United States on its behalf. Both the Tribe and the State claimed title to the riverbed.

The district court divided the trial into three phases. In the first two phases, the court considered whether the Utility had flooded Reservation land and whether the Tribe or the State owned the bed of the river. In our first opinion, reported at 926 F.2d 1502, we sustained the district court's holdings that the Utility had trespassed upon the Reservation by raising the level of the river and that the State, rather than the Tribe, owned the bed of the river.

In the final phase of the trial, the district court considered the remedy for the Utility's trespass. On this appeal, the Utility repeats its contention that the district court erred in concluding the Utility had trespassed on Reservation land. The Utility also contends the court erred in dismissing its counterclaim in condemnation against the United States and the Tribe, refusing to grant declaratory relief regarding the calculation of future damages, and awarding prejudgment interest on the damage award. The Tribe and the United States argue the district court erred in failing to include the value of the land as part of the power project in determining the amount of damages, refusing to grant injunctive relief,

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[1] Title to the Reservation, including the land along the river, is held in trust by the United States for the Kalispel Indian Tribe and individual Indian allottees.

and denying the Tribe leave to amend its complaint to allege a claim for water and fishing rights.

We adhere to our determination that the Utility trespassed on the Tribe's lands; we affirm the denial of the Utility's motion for declaratory relief and the Tribe's motion to amend its complaint; and we reverse the damage and prejudgment interest awards and the denial of injunctive relief.

I. LIABILITY FOR TRESPASS

The Utility argues there was no trespass because Article 33 of the project license authorizes the Utility to flood Reservation land and compensate the Tribe at the rate the Utility pays private land owners--the rental value of the land as grazing land. It is too late for the Utility to challenge the existence of a trespass. That question was resolved against its position by the district court, and we affirmed the district court's conclusion in our first opinion. During phase three of the trial, the district court found the Utility knew it had no right to flood Reservation land, but flooded it anyway, a finding supported by substantial evidence.[2]

In any event, the Utility's interpretation of Article 33 is without merit. The language of Article 33 neither authorizes the Utility to flood Reservation land, nor specifies the amount of damages the Utility would owe the Kalispel Indians if it did. The first clause requires the Utility to

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[2] The Utility obtained easements to flood land neighboring the Reservation. It flooded the land at issue here only after the Kalispel Indians refused to grant similar easements.

operate the Dam in such "a manner as not to interfere with or damage Indian land of the [K]alispel Indian Reservation."[3] The second clause provides an administrative procedure for compensating the Indians if the Utility breaches the prohibition against flooding Reservation land: "[I]n the case such damage should occur as a result of the operation of the project, the Indians shall be compensated in the manner and amount as determined by the Secretary, after consultation with the [K]alispel Indian Community Council and Licensee." Nothing indicates creation of this administrative remedy was intended to affect the rights of the Tribe and the United States if they choose instead to file a trespass action in federal court, as they did.

If read as the Utility suggests, Article 33 would authorize the taking of Reservation land by inverse condemnation in violation of federal law and the use of such land in a manner contrary to the provisions of the Federal Power Act. The Utility may not condemn tribal lands embraced in a reservation under the Power Act or any other federal statute, Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 786 n. 29, 104 S.Ct. 2105, 2117 n. 29, 80 L.Ed.2d 753 (1984); FPC v. Tuscarora

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[3] In a letter to the Commission proposing Article 33, the Secretary of the Interior explained the purpose of the provision:

> "Indian lands and interests on the Reservation will not be adversely affected if backwater from the dam is not allowed to raise the water- surface levels adjacent to Indian lands during flood flows. The spillway gates at Box Canyon should be so operated that the maximum river water surface elevations adjacent to Indian lands will not damage those lands."

Indian Nation, 362 U.S. 99, 113-14, 80 S.Ct. 543, 551-52, 4 L.Ed.2d 584 (1960), and may not take the land of individual Indian allottees through inverse condemnation, United States v. Clarke, 445 U.S. 253, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980). Section § 4(e) of the Power Act prohibits the use of reservation lands for power production unless the Commission finds "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" and the Secretary of the Interior imposes "such conditions as the Secretary ... shall deem necessary for the adequate protection and utilization of such reservation." 16 U.S.C. § 797(e). Section 10(e)(1) of the Power Act prohibits the use of tribal lands embraced within a reservation unless the Commission fixes a "reasonable annual charge" for the use of the lands and the Indian tribe approves the charge. 16 U.S.C. § 803(e)(1). None of these conditions were met. Neither the Commission nor the Secretary approved the flooding of the Reservation; the Commission did not find the Reservation could be flooded without interfering with the purpose for which the Reservation was created; the Secretary did not determine what conditions might be necessary for the protection and utilization of the Reservation; the Commission did not fix an annual charge for use of Reservation land, and the Tribe was not asked to approve such a charge.

These omissions apparently resulted from the failure of the Utility to disclose that Reservation land would be flooded by the project. The application and the license itself indicated the project would be so constructed and maintained that the Reservation would not be affected. The license stated the water level would be higher in normal flows "for possibly 24 miles upstream." The reservation is located 30

miles upstream. The license also incorporated a map locating the project boundary six miles downstream from the Reservation.[4]

Based on the language of Article 33, the statutory scheme governing the use of Indian reservation lands, and the other evidence in the record, we conclude the project was to be operated in such a way as not to flood Reservation land, and that Article 33 was intended to reinforce that prohibition and provide a remedy for its violation, rather than to confer blanket authority upon the Utility to trespass on Reservation land.[5]

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[4] The Utility notes that its license was amended in 1961 to allow it to raise the backwater at the Albeni Falls Dam upstream from the Reservation by an amount that would result in flooding Reservation lands adjacent to the river. The amendment, however, could not authorize the Utility to flood Reservation land. As noted in the text, the Utility could not use such land for the project unless the Secretary and the Commission authorized the use under § 4(e) and § 10(e) of the Power Act. Moreover, the 1961 amendment provided: "It is not necessary to extend the existing Project Boundary further upstream because of the fact that the limitation of not exceeding the natural elevation at Cusick for 90,000 cfs flow [as proposed by the Amendment] does not change the maximum effect of the back- water upstream of the Project Boundary."

[5] The Utility's fall-back position is that if trespass occurred, damages are to be determined in accordance with state law pursuant to 16 U.S.C. § 814 of the Power Act. That section applies to the exercise by a licensee of the power of

(continued...)

II. DAMAGES

A. Primary Jurisdiction.

The Tribe contends the Secretary of the Interior has primary jurisdiction to determine questions relating to damage to Reservation land due to operation of the Dam by virtue of Article 33 of the license[6], and asks that these proceedings be stayed to allow the Secretary to exercise that jurisdiction.[7] The doctrine of primary jurisdiction is

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[5](...continued)
eminent domain to acquire private lands for a power project. No such proceeding was or could have been utilized here to acquire the use of tribal lands on the Reservation. Escondido, 466 U.S. at 786 n. 29, 104 S.Ct. at 2117 n. 29; Tuscarora, 362 U.S. at 113-14, 80 S.Ct. at 551-52.

[6] Article 33 provides in full: The project shall be operated by the Licensee in such a manner as not to interfere with or damage Indian land of the Calispel [sic] Indian Reservation, or, in case such damage should occur as a result of the operation of the project, the Indians shall be compensated by the Licensee in the manner and amount as determined by the Secretary of the Interior, after consultation with the Calispel [sic] Indian Community Council and the Licensee.

[7] The Tribe seeks to supplement the record on appeal with evidence that it has initiated Article 33 proceedings before the Secretary. Federal Rule of Appellate Procedure 10(e) allows addition of anything "omitted from the record by error or accident." The evidence offered by the Tribe does not fall in this category.

inapplicable. The Secretary's authority to pass on damage issues arises from Article 33 of the project license, not from a grant of jurisdiction by Congress pursuant to a comprehensive regulatory scheme. United States v. General Dynamics Corp., 828 F.2d 1356, 1362-66 (9th Cir.1987). Congress authorized the Secretary to impose conditions in a project license "necessary for the adequate protection and utilization of [a] reservation," 16 U.S.C. § 797(e), but Congress neither required the Secretary to include Article 33 in the license nor placed the damage issue "within the special competence of an administrative body" under "a regulatory scheme." United States v. Western Pac. R.R., 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956).

B. Standard for Determining Damages.

The district court concluded the Utility flooded approximately 186.7 acres of Reservation land for 30 years without an easement or court order, and awarded damages totalling $46,231. The court apparently concluded Washington law controlled and under that law the Tribe was entitled to recover only the rental value of the land for grazing.

The Tribe and the United States argue damages for trespass on Indian lands are controlled by federal law and the damage award was inadequate under federal law because it did not reflect the value of the land as a part of the Box Canyon Dam project.[8] They reason that if inclusion of

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[8] The Utility does not dispute that federal law controls an action for trespass on Indian land. See County of Oneida v.

(continued...)

tribal lands within the Reservation had been anticipated, the Commission, in compliance with § 10(e) of the Power Act, would have included in the project license a provision fixing an annual charge for use of the lands and the annual charge would have been calculated on the basis of the value of the use of the land as part of the project. Since operation of the project in fact affected such lands, and since the Utility circumvented the provisions of § 4(e) and § 10(e) and preempted the fixing of an annual charge by flooding the lands without first securing a license to do so, the Tribe and the United States reason the Utility must pay the Tribe what

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*(...continued)

Oneida Indian Nation, 470 U.S. 226, 234, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169 (1985) (right of Indians to occupy lands held in trust by the United States for their use is "the exclusive province of federal law"). The Supreme Court has recognized a variety of federal common law causes of action to protect Indian lands from trespass, including actions for ejectment, accounting of profits, and damages. See, e.g., Marsh v. Brooks, 49 U.S. (8 How.) 223, 232, 12 L.Ed. 1056 (1850) (action for ejectment); United States v. Santa Fe Pacific R.R., 314 U.S. 339, 359, 62 S.Ct. 248, 257-58, 86 L.Ed. 260 (1941) (action for accounting); County of Oneida, 470 U.S. at 233- 36, 105 S.Ct. at 1250-52 (action for damages); United States v. Southern Pacific Transp. Co., 543 F.2d 676, 682-84 (9th Cir.1976) (action for damages). The federal interest in protecting the rights of Indians to occupy their lands is also expressed in the Federal Power Act which creates a specific statutory scheme governing the use of tribal lands embraced within Indian reservations. Tuscarora, 362 U.S. at 118, 80 S.Ct. at 554-55.

the Tribe lost--the annual charge that would have been imposed if § 10(e) procedures had been implemented.

Whether the Commission would have determined the annual charge for use of tribal lands on this basis when the Utility's license was issued in 1952 is a matter of conjecture. Clearly § 10(e) did not require the Commission to do so. The Commission's discretion in determining appropriate annual charges was limited only by the requirement that the charges be "reasonable." City of Vanceburg v. FERC, 571 F.2d 630, 647 (D.C.Cir.1977) ("[T]he Commission has a discretion within the statute in fixing 'reasonable annual charges', and thus conceivably might use any one of several methods in calculating the charge...."); Montana Power Co. v. FPC, 298 F.2d 335, 340 (D.C.Cir.1962) (holding that the only question is "whether the end result is a reasonable one as the statute requires it to be").

In 1952, the regulations implementing § 10(e) specified the annual charge for use of government lands "will be based on the estimated value for power purposes." As to tribal lands, however, the regulations provided only that the Commission should determine the annual charge "on a case-by-case basis under § 10(e) of the Federal Power Act."[9]

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[9] 18 C.F.R. § 11.22 (1938) read: Use of Government dams, structures, tribal lands. Reasonable annual charges for recompensing the United States for the use of Government dams ..., and for the use, occupancy, and enjoyment of the lands of the United States adjoining or pertaining thereto, will be based upon the estimated value for power purposes of the properties and privileges for which a license is issued: Provided,

(continued...)

The Commission considered adopting a general rule for determining annual charges for a licensee's use of tribal lands, but declined to do so, preferring instead to set annual charges according to the facts of each case. Escondido Mut. Water Co., FERC Opinion No. 36-A, 6 F.E.R.C. (CCH) P 61,189 (1979).[10]

The Tribe and the United States cite several cases for the proposition that under the regulations applicable in 1952, the annual charge fixed by the Commission for the use of tribal lands within the Reservation would have included the power site or shared benefits value of the land. In each of the cases cited, however, the license itself specified the charge fixed should be based "upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development." Montana Power Co. v. FPC, 459 F.2d 863, 869 (D.C.Cir.1972); Confederated Salish and Kootenai Tribes v. United States,

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*(...continued)

however, That annual charges ... for use of tribal lands embraced within Indian reservations shall be determined in accordance with the provisions of section 10(e) of the Federal Power Act.

[10] The Commission stated: The Federal Power Act ... is silent as to how annual charges shall be computed.... We considered fixing the annual charges herein on the basis of the most profitable use of the tribal lands involved herein, as Interior advocates. But since we are not bound to fix [annual charges] in any particular manner, and since we are not bound to fix them in the same manner in every case, we have decided that the net benefits method is more appropriate in this instance.

181 Ct.Cl. 739, 747, (1967); see also Escondido Mut. Water Co. v. FERC, 692 F.2d 1223, 1228 (9th Cir.1982), amended, 701 F.2d 826 (9th Cir.1983), rev'd in part, 466 U.S. 765, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984). Moreover, the language of the licenses at issue in Montana Power and Confederated Salish was taken directly from Commission regulation 14, section 5, which was superseded in 1938, before the license for the Box Canyon Dam project was issued.[11]

Although use of the value of the tribal lands as part of the power project in calculating the annual charge is not compelled by regulation or case law, we nevertheless conclude it is the most acceptable measure of damages for the Utility's trespass. As noted, the power site formula was reflected in the governing regulation prior to 1938, and the United States has advised the court this is the formulation now applied by the Commission in fixing annual charges for use of tribal lands on all power projects. Its use will also assure the Tribe will not suffer an uncompensated loss from the Utility's past failure to comply with the Power Act and will encourage future compliance.

The damage calculation urged by the Utility would encourage others to use Indian reservation lands for power

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[11] Regulation 14, section 5, read: When licenses are issued involving the use of tribal lands embraced within Indian reservations the commission will fix a reasonable annual charge for the use thereof, based upon the commercial value of the land for the most profitable purpose for which suitable, including power development. The charge shall commence upon date license is issued. FPC Rules and Regulations 33 (1921).

production without complying with the Power Act. Applicants for licenses would be motivated to deny or minimize the anticipated effect of their project on Indian reservation lands (as the Utility did in this case) to avoid the risk that the Secretary and Commission might deny them use of the lands under § 4(e), or the Commission might require them to pay annual charges that included the power site value of the tribal lands under § 10(e). The Secretary and Commission cannot fulfill their respective obligations under § 4(e) and § 10(e) when applicants for Power Act licenses deny or understate the effect their projects will have on Indian reservation lands, or do not seek approval to use Indian reservation lands after they discover their projects include such lands.[12] Moreover, circumventing the Act would deprive the Indians of their right, granted under § 4(e) and § 10(e), to influence the terms upon which the licensee uses reservation land. Requiring the Utility to reimburse the Tribe for the most profitable use of its land will encourage future applicants for licenses to fully disclose the effect of their projects on Indian reservation lands and current licensees to seek approval to use such lands from the Secretary and Commission.

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[12] A Power Act license may be amended to include Indian reservation lands. 16 U.S.C. § 803(b) (requires FERC approval for alterations to project); 18 C.F.R. § 4.200 (provides procedures for amending license). See, e.g., Lac Courte Oreilles Band v. FPC, 510 F.2d 198, 200 n. 4 (D.C.Cir.1975).

III. PROSPECTIVE RELIEF

A. Injunctive Relief.

The Tribe and the United States sought an injunction against future flooding of Reservation land. The district court denied relief on the ground the Indians would be fully compensated in a condemnation proceeding the Utility had filed to condemn a permanent flowage easement.[13]

The district court's ruling rested on an erroneous legal premise. Congress has the exclusive right to extinguish Indian title to lands, United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R., 314 U.S. 339, 347, 62 S.Ct. 248, 252, 86 L.Ed. 260 (1941), and has not authorized condemnation of land held in trust by the United States for the benefit of the Tribe. A licensee cannot condemn tribal lands under § 21 of the Power Act, 16 U.S.C. § 814, but must obtain Commission authorization to use such lands under § 4(e) and § 10(e) of the Power Act. Escondido, 466 U.S. at 786 n. 29, 104 S.Ct. at 2117 n. 29; Tuscarora, 362 U.S. at 113-14, 80 S.Ct. at 551-52.

The Utility may be able to condemn land held in trust by the United States for the benefit of individual Indian allottees

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[13] The Utility filed a counterclaim for condemnation in this action and initiated a separate condemnation proceeding, but the latter was stayed pending the outcome of this case, and (as discussed below) the former was dismissed for failure to serve the individual allottees.

under 25 U.S.C. § 357,[14] but this statute does not apply to land held in trust for the Tribe. Nebraska Public Power Dist. v. 100.95 Acres of Land, 719 F.2d 956, 961 (8th Cir.1983). Even if the Utility could condemn land held in trust for individual allottees, it could not occupy such land until it obtained judgment through a condemnation proceeding, Clarke, 445 U.S. 253, 100 S.Ct. 1127 (25 U.S.C. § 357 does not authorize inverse condemnation), which it has not done. In addition, since a significant portion of the land along the river is held in trust for the Tribe and would be flooded if the Utility flooded the land held in trust for individual allottees, the Utility could not raise the level of the river without violating the rights of the Tribe.

On remand, the district court should consider whether to issue an injunction in light of the correct legal principles and the Utility's and State's assertion that a large part of the Pacific Northwest would suffer a power shortage if the Utility were enjoined from flooding the land in question. If the district court decides to enjoin the flooding, it could fashion a remedy to minimize the harm such an injunction might cause. The court could, for example, enjoin the Utility from occupying Reservation land but stay the order to

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[14] This statute provides: Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee. 25 U.S.C. § 357.

permit the Utility to seek an amendment to its license and satisfy the Power Act, especially § 4(e) and § 10(e).[15]

B. Declaratory Relief.

Since the Box Canyon Dam license does not authorize the Utility to flood Reservation land, the district court acted in its discretion in refusing to grant declaratory relief regarding the calculation of future damages.

IV. DENIAL OF TRIBE'S MOTION TO AMEND

Twenty four days before trial of the third phase was to begin, the Tribe sought leave to amend its complaint in intervention to allege a claim for water and fishing rights under Winters v. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908). The district court denied the motion as untimely. We reversed because the district court had relied solely upon the Tribe's delay in bringing the motion without considering whether the opposing parties had been prejudiced. United States v. Pend Oreille Public Utility Dist. No. 1, 926 F.2d 1502, 1511-12 (9th Cir.1991). On remand, the district court found the delay had been unduly long and that the Utility would be prejudiced if the motion were granted. Fed.R.Civ.P. 15(a); Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 538 (9th Cir.1989) ("In deciding whether justice requires granting leave to amend, factors to be considered include the presence or absence of undue delay ... [and] undue prejudice to the opposing party....").

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[15] Presumably, such a stay would require the Utility to post a bond as security for the rights of the Tribe and the United States.

The Tribe's delay was extreme and unexplained. The legal basis for the claim had existed since 1908. The United States filed the action in March of 1980. The Tribe intervened in August of 1982. The Tribe moved to add the Winters claim seven years after the case began, five years after leave to intervene was granted, eleven months after the district court entered judgment against the Tribe in the second phase, approximately a month after the close of discovery in the third phase, and twenty-four days before the commencement of the third phase trial. The Tribe offered no explanation for the delay.

Prejudice to the Utility would have been substantial. The Tribe had alleged ownership of the beds and shores of the river but not of the water or fish. The extensive discovery undertaken prior to the second phase trial did not consider reserved water and fishing rights. Completed depositions would have to be retaken, new depositions of yet-to-be retained experts would have to be scheduled, and new state agencies would have to be brought into the action with new attorneys to represent the interests of those agencies.[16] Trial of the third phase would have been substantially delayed.

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[16] The Department of Natural Resources, which has authority over aquatic lands acquired by the State, is the only state agency named as a defendant in this action. The Department of Wildlife has authority over game and fish, and the Department of Ecology has authority over water. The district court found each agency was represented by a different division within the Washington State Attorney General's office.

The district court's findings regarding undue delay and prejudice are not clearly erroneous and amply justify denial of the motion to amend. See Western Shoshone Nat'l Council v. Molini, 951 F.2d 200, 204 (9th Cir.1991); Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir.1990); M/V American Queen v. San Diego Marine Const., 708 F.2d 1483, 1492 (9th Cir.1983).

V. DISMISSAL OF UTILITY'S COUNTERCLAIM

The district court allowed the Utility to amend its answer to include a counterclaim in condemnation. The counterclaim was served on the attorneys for the United States and the Tribe. The court dismissed the claim for failure to serve the individual Indian allottees of the land the Utility sought to condemn. The Utility contends dismissal was improper because the United States represented both the Tribe and the allottees. We agree. When a party is represented by an attorney, service on that attorney is proper service. Fed.R.Civ.P. 5(b). The United States has discretion to represent the individual Indian allottees under 25 U.S.C. § 175. Siniscal v. United States, 208 F.2d 406, 410 (9th Cir.1953). The record establishes the United States and the Tribe represented all the Indian landowners in the case.[17]

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[17] The United States' complaint reads: This is a civil action brought by the United States of America in its sovereign capacity and as trustee on behalf of the Kalispel Indian Tribe (aka Kalispel Indian Community) and individual Kalispel allottee[s] holding beneficial interest in allotte[d] trust lands flooded by the Pend Oreille County Public Utility District No. 1. The Tribe's petition to intervene states: "Each Indian owner

(continued...)

On remand, the district court should consider whether the Utility can state a claim for condemnation.[18]

VI. PREJUDGMENT INTEREST

The Utility argues the district court erred in awarding pre-judgement interest. The district court awarded prejudgment interest pursuant to state law, presumably because it calculated damages pursuant to state law. Since this case arises under federal law, the district court should apply federal pre-judgment interest principles. Home Savings Bank, F.S.B. v. Gillam, 952 F.2d 1152, 1161 (9th Cir.1991) ("The award of pre-judgement interest in a case arising under federal law rests within the sound discretion of the court."); Board of County Commissioners v. United States, 308 U.S. 343, 352, 60 S.Ct. 285, 289, 84 L.Ed. 313 (1939) ("The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable."). On remand, the district court should determine under federal law whether prejudgment interest is appropriate and the appropriate amount.

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[17](...continued)
of lands affected by this law suit has signed a written authorization requesting and authorizing the United States and the Tribe to continue the foregoing case on his or her behalf."

[18] As noted above, the Utility cannot condemn the land held in trust for the Tribe, and it cannot condemn the land held in trust for the individual allottees without affecting the Tribe's land.

VII. CONCLUSION

We reverse the district court's damage award and remand for recalculation according to the most profitable use of the flooded Reservation land. On remand, the district court may consider whether this is an appropriate case for prejudgment interest under federal law. We also reverse the district court's order denying an injunction and dismissing the Utility's counterclaim in condemnation. We affirm the denial of the Utility's motion for declaratory relief and the Tribe's motion to amend its complaint to add a Winters claim.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff-Appellee, and KALISPEL INDIAN TRIBE, Intervening-Plaintiff, v. PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation, Defendant, and DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant-Intervenor-Appellant.	)	No. 88-3617 **FILED MAY 26, 1988**
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff-Appellee, and KALISPEL INDIAN TRIBE, Intervening-Plaintiff, v. PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation, Defendant-Appellant, and	)	No. 88-3618

DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant-Intervenor.	)	
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff-Appellant, and KALISPEL INDIAN TRIBE, Intervening-Plaintiff, v. PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation, Defendant-Appellee, and DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant-Intervenor.	)	No. 88-3619
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff, and KALISPEL INDIAN TRIBE, Intervening Plaintiff-Appellant, v.	)	No. 88-3669

PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation,
Defendant-Appellee,
and
DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON,
Defendant-Intervenor-Appellee.

On May 23, 1988, a Prebriefing Conference was held before Conference Attorney Meredith J. Watts. Kalispel Indian Tribe was represented by Robert D. Dellwo. Pend Oreille County P.U.D. #1 was represented by Jerry Boyd and Diane Hermanson. United States was represented by Elizabeth Ann Peterson. State of Washington was represented by Lawrence Coniff.

(1) Appellants shall file a brief on the ordinary high water mark issue by October 3, 1988.

(2) Appellee shall file an answering brief on or before November 7, 1988.

(3) Appellants may file a reply brief within 21 days of the service date of appellees' brief.

Appellants shall file their opening brief on the issue of aboriginal title to the stream bed within 30 days of the filing of the reply brief on the water mark issue. Further briefing shall be set by conference.

This order is subject to reconsideration by a judge if any objection is filed within 10 days of the entry of the order.

FOR THE COURT:

/s/
Meredith J. Watts
Conference Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff-Appellee, and KALISPEL INDIAN TRIBE, Intervening-Plaintiff, v. PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation, Defendant, and DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant-Intervenor-Appellant.	)	No. 88-3617 D.C. No. CV-80-116-JLQ Western Washington (Spokane) **FILED JULY 3, 1989**
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff-Appellee, and KALISPEL INDIAN TRIBE, Intervening-Plaintiff, v. PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation, Defendant-Appellant, and	)	No. 88-3618 D.C. No. CV-80-116-JLQ Western Washington (Spokane)

DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant-Intervenor.	)	
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff-Appellant, and KALISPEL INDIAN TRIBE, Intervening-Plaintiff, v. PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation, Defendant-Appellee, and DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant-Intervenor.	)	No. 88-3619 D.C. No. CV-80-116-JLQ Western Washington (Spokane)
UNITED STATES OF AMERICA, as trustee for the Kalispel Indian Tribe and individual allottees, Plaintiff, and KALISPEL INDIAN TRIBE, Intervening Plaintiff-Appellant, v.	)	No. 88-3669 D.C. No. CV-80-116-JLQ Western Washington (Spokane)

PEND OREILLE PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation, Defendant-Appellee, and DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant-Intervenor-Appellee.	)	**ORDER**

On June 2, 1989, a prebriefing conference was held before Conference Attorney Meredith J. Watts. Kalispel Indian Tribe was represented by Robert D. Dellwo. Pend Oreille County and P.U.D. #1 were represented by Jerry Boyd and Diane Hermanson. The United States was represented by Elizabeth Ann Peterson. The State of Washington was represented by Lawrence Coniff.

The parties have determined to file a stipulated motion to have the court hear and decide the legal issues brief in Phases I and II before briefing is ordered for Phase III. The conference attorney recommends that the court grant the motion in the interests of judicial economy and efficiency.

This order is subject to reconsideration by a judge if any objection is filed within 10 days of the entry of the order.

FOR THE COURT:

/s/
Meredith J. Watts
Conference Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, and KALISPEL INDIAN TRIBE, Plaintiff/Intervenor, vs. PEND OREILLE COUNTY PUBLIC UTILITY DISTRICT NO. 1, a municipal corporation, Defendant, and DEPARTMENT OF NATURAL RESOURCES, STATE OF WASHINGTON, Defendant/Intervenor.	)	No. C 80-116 RMB FINDINGS OF FACT AND CONCLUSIONS OF LAW and JUDGMENT **FILED AUGUST 10, 1987**

FINDINGS OF FACT

1. The United States Federal Power Commission Order issued a license to The Public Utility District #1, Pend Oreille County, on February 5, 1952 to operate the Box Canyon Dam on the Pend Oreille River. Number 7 on Page 5 of the license, under the heading in which the Power Commission notes several factors when considering the protests to the Box Canyon Project, reads as follows:

> The proposed plan of operation for the project contemplates that from about July to mid-September the tentative reservoir operating schedule will result

> in minimum flooding effects on existing productive wild hay lands and that during the ensuing non-growing winter and early spring months operation involving one foot of backwater effect at Albeni Falls will prevail for flows up to 90,000 c.f.s. operation during the spring and summer flood period may be available but will be such as not to augment either local flooding within the diked areas or the natural hazards of overtapping any of the main dikes along the river.

Defendant's Exhibit 2000.

Article 33 on page 8 of the license reads as follows:

> The project shall be operated by the Licensee in such a manner as not to interfere with or damage Indian land or the Calispel Indian Reservation, or, in case such damage should occur as a result of the operation of the project, the Indians shall be compensated by the Licensee in the manner and amount as determined by the Secretary of the Interior, after consultation with the Calispel Indian Community Council and the Licensee.

Defendant's Exhibit 2000.

2. The Harza Engineering Company's "Project Planning Report for the Box Canyon Project" (The Harza Report), dated October 1951, described the study of the feasibility and specifications of the Box Canyon Project. (Exhibit 201). In the Summary of the Harza Report, the Company projected the average flow at about 25, 900 c.f.s.

> Power and energy capabilities [were] based on the assumption that the headwaters of the Box Canyon Project will encroach, at times, about one foot on the tailwater at Albeni Falls. ...The governing criteria for spillway discharge capacity is the ability to pass all expected flood flows without backwater effects.

Exhibit 201A.

The Tabulation of Significant Data appended to the Summary indicates that the net head for turbine rating was 41 feet and the maximum operating head was 48 feet. Id. Again, Plate 18 in the Harza Report indicates that with one foot of backwater at Albeni Falls and a head of 41 feet the flow would approximate 25,900 c.f.s. Plate 17 indicates that with a flow of 25,900 c.f.s. an approximate water level at Cusick of between 2031.5 and 2032.0 feet would result.

3. In a letter dated February 9, 1955, Superintendent Elmo Miller of the Northern Idaho Indian Agency, Bureau of Indian Affairs (Northern Idaho Indian Agency), referring to a memorandum from the acting head of the federal land office, states that it appears

> that the various allottees and Kalispel tribe would be entitled to payment for all the damages on the property owned by them that will be affected by the Box Canyon Dam.

Defendant's Exhibit 2008 (Letter from Elmo Miller to the Public Utility District No. 1 (Feb. 9, 1955).

4. In a letter dated January 22, 1954, Superintendent M.L. Robertson of the Northern Idaho Indian Agency returned an approved warranty deed form to be used in securing flowage easement on the Kalispel Reservation. Defendant's Exhibit 2053 (Letter from M.L. Robertson to Public Utility District No. 1 (Jan. 22, 1954)).

5. In 1954 the PUD acquired easements to various parcels on the Kalispel Reservation. These warranty deeds granting the easements were signed in March, September, and October of 1954. Each warranty deed contained a recital that stated that the easement was to property

> lying below 2031.3 feet above mean sea level ...[and d]uring the haying season which is approximately July 1 to September 15 of each year, whenever Albeni Falls is releasing not more than 20,000 c.f.s. of water, Box Canyon gates will be operated so that the level of water at the Cusick gauging station will not exceed elevation 2028 feet above mean sea level...

Defendant's Exhibit 2055 (Warranty deeds granting the PUD easements on the Kalispel Indian Reservation (1954)). See Findings of Fact and Conclusions of Law, Kalispel v. PUD #1, Fact 36 (Aug. 26, 1983).

6. The approved blueprint of the estimated damages below mean high water prepared for the Box Canyon Project in 1951 indicates that the estimated damage level was 2031+ feet. H.A. Sewell prepared this document. Defendant's Exhibit 2012 (Blueprint of the estimated damages below mean high water caused by the Box Canyon Project prepared

by H.A. Sewell for the PUD (prepared May 23, 1953 and attested to by Sewell October 6, 1954)).

7. In a document he prepared, dated May 29, 1987, and in his June 3, 1987 testimony H.A. Sewell calculated the Indian Land between elevations 2028 feet and 2035 feet to be 186.07 acres. He determined that the Kalispel land presently under easement totalled 33.86 acres (allotments 18, 31, 83, 86, and 105 were already subject to easements up through a height of 2031.3 feet. Plaintiff's Exhibit 1004). Comparing these numbers Sewell determined that the Indian lands without easement totalled 152.10 acres. Plaintiffs stipulated to these acreage figures.

8. PUD Resolution NO. 544 amended the license to increase the maximum allowable backwater at the Albeni Falls Power Plant from 1.0 to 2.0 feet. The PUD knew that to achieve a head of 41 feet with 2.0 feet of backwater at Albeni Dam it would require a flow of in and around 30,000 c.f.s. See the Harza Report, Plate 18. With a 2.0 feet backwater at Albeni Falls, such a flow would result in a water level of approximately 2034 feet at Cusick. See Plaintiff's Exhibit 1013 (Volpe Report on Box Canyon Project Data. Table 1 lists Cusick elevations for various flows with 2.0 feet of backwater at Albeni Falls.).

9. The PUD knew it was exceeding any easements it had to flood land on the Kalispel Indian Reservation.

> Our District operating levels of the Box Canyon Dam, for the past several years during the winter seasons, have been near the 2033 level. This is nearly 8 feet below the mean high water levels of

> the Pend Oreille River, yet it is some 2 feet above the present easement obtained by our District. We are presently planning to obtain easement to an elevation of 2035.5 in the area.

Letter from Albert T. Strayer of the PUD to Vincent Little, Acting Superintendent Northern Idaho Agency (Oct. 25, 1967).

The PUD partially completed the process of securing easement from the various landowners. See

a. Defendant's Exhibit 2020 (list of property owners);

b. Defendant's Exhibit 2057 (Memorandum from C.G. Birdshead, Supervising Real Property Management Officer of the Northern Idaho Agency, to William E. Ensor, Jr. Superintendent of the Northern Idaho Agency (Oct. 16, 1963) (outlining discussion with William Strayer and Mr. Beasley of the PUD regarding additional easements up to elevation 2035.5 feet));

c. Defendant's Exhibit 2021 (Letter from Albert T. Strayer to William E. Ensor, Jr., Northern Idaho Agency (Nov. 27, 1963) (submitting form of easement for agency approval));

d. Defendant's Exhibit 2022 (Blueprint prepared by H.A. Sewell for the PUD showing present and planned easements) (Prepared Nov. 29, 1963 and certified Dec. 2, 1963));

e. Defendant's Exhibit 2028 (Letter from Bill Bryan, Acting Superintendent of the Northern Idaho Agency to the PUD (Aug. 9, 1966) (request for a map showing additional allotments and request for a schedule of damages to facilitate approval of the easement form and the appraisal));

f. Defendant's Exhibit 2030 (Letter from Bill Bryan, Acting Superintendent of the Northern Idaho Agency to Albert T. Strayer, Auditor and Land Rights Agent for the PUD (Oct. 19, 1966) (approval of the forms of the deeds of trust for the flowage easement with several minor changes));

g. Defendant's Exhibit 2031 (Letter from Albert T. Strayer to Bill Bryan (Oct. 31, 1966) (indicating will proceed to secure easement approvals));

h. Defendant's Exhibit 2033 (Letter from Albert T. Strayer to Vincent Little, Acting Superintendent of the Northern Idaho Agency (Oct. 25, 1967) (proposed invitation for leasing includes lands that are affected by higher PUD water levels)); and

i. Defendant's Exhibit 2036 (Letter from Vincent Little to Albert T. Strayer (Oct. 7, 1968) (tribal council will meet to discuss leasing and trespassing)).

The PUD's attempts at securing easements, and delays by the Indians and the government in processing or finalizing the agreements, demonstrates that the PUD did not act in bad faith.

10. The PUD did obtain easements from all landowners but the Indians. When the easements were never finalized

the PUD went ahead and raised the backwater at the Albeni Falls Dam, from 1.0 foot to 2.0 feet.

11. The Court has already determined that the ordinary high water line is 2034 feet at the Cusick gauge. Kalispel vs. Public Utility District No. 1, CIV-80-116, Conclusions of Law #1 (Aug. 26, 1983).

12. The existing easements executed in 1954 allowed the flooding of Kalispel Indian land up to 2031.3 feet at the Cusick gauge except during July 1st through September 15th of each year, when the easement could not exceed 2038 feet at the Cusick gauge.

13. Water levels regularly exceeded the 2038 feet level at Cusick gauge between July 1st and September 15th. The following examples are typical of the years since the Box Canyon Dam began operating. During the water year 1953-1954 the water level exceeded 2028 feet at the Cusick gauge 29 times between July 1st and September 15th. In the water year 1963-1964 the water level exceeded 2028 feet at the Cusick gauge 77 times (every day) between July 1st and September 15th. In the water year 1973-1974 the water level exceeded 2028 feet at the Cusick gauge 77 times (every day) between July 1st and September 15th. As a final example, in the water year 1983-1984 the water level exceeded 2028 feet at the Cusick gauge 77 times (every day) between July 1st and September 15th.

14. Throughout the years water levels at the Cusick gauge regularly exceeded 2034 feet. The following examples are typical of the years since the Box Canyon Dam began operating. In the water year 1953-1954 the water level at the

Cusick gauge exceeded 2034 feet 67 times. In the water year 1963-1964 the water level at Cusick exceeded 2034 feet 72 times. In the water year 1973-1974 the water level exceeded 2034 at Cusick 101 times. In the water year 1983-1984 the water level at Cusick exceeded 2034 feet 93 times.

15. Plaintiff has suffered no irreparable injury for 2 reasons:

a. The tribe and individual allottees can be compensated fairly for the use of their land; and

b. The PUD has filed a condemnation action seeking a permanent flowage easement.

16. The granting of any injunctive relief would cause greater harm to the Defendant PUD. Furthermore, this conduct, though unlawful, was in part a product of inaction on the part of the Plaintiff, Tribe, and individual allottees. This inaction would have lead a reasonable person to believe the easement sought would be granted.

17. The damages as set forth in Schedule A are determined by multiplying the acreage (stipulated to be 186.07) by the AUM (animal unit month) for each year (AUMs used range from 1-9.50) times the AUM per acre (1.8). The acreage amount was stipulated to be counsel, the AUM is derived from Plaintiff's Exhibit 1011, and the AUM per acre is taken from the testimony of Dennis Olson.

CONCLUSIONS OF LAW

1. Flooding of lands without obtaining easements from Indians or an appropriate court order allowing such flooding constitutes a trespass. In the State of Washington, where a municipality has damaged land for public purposes, such as in this case, the only remedy authorized under state law is just compensation for such taking. Brazil v. City of Auburn, 93 Wn.2d 484, 610 P.2d 909, 913, 916-16 [sic] (1980). The PUD has committed a trespass. Findings of Fact and Conclusions of Law, Kalispel, Conclusion #5. The flooding of the land above a height of 2028 feet at Cusick repeatedly between July 1st and September 15th of each year constitutes a trespass to the land presently under easement (33.86 acres) between heights 2028 and 2031.3. The flooding of the land under easement above 2031.3 feet at Cusick and the flooding of the remaining land between 2028 and 2034 (152.10 acres) constitutes a trespass. The PUD has trespassed on a total of 186.07 acres of the Kalispel Indian Tribe and individual Indian allottees.

2. Damages awarded are for the use of the property and do not constitute any award for a permanent taking of the property. See Auburn, 93 Wn. 484, 610 P.2d 909.

3. This is a proper case for the award of interest under Washington law. Prejudgment interest is an element of complete compensation. See, e.g. General Motors Corp. v. Devex Corp.. 461 U.S. 648, 655-56, 103 S.Ct. 2062-63 (1983). "The cases teach us that interest is not recoverable according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be

inequitable." Board of Com'rs of Jackson County v. United States, 308 U.S. 343, 352, 60 S.Ct. 285, 289 (1939). "With reference to other federal rights, the state law has been absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy. See Brown v. United States, 263 U.S. 78; Seaboard Airline Co. v. United States, 261 U.S. 299." Board of Comm'rs v. United States, 308 U.S. 343, 351-352, 60 S.Ct. 285, 288-89 (1939). Here the award of interest to the Indian Tribe for damages caused by a trespass is not inconsistent with federal policy. Under Washington law prejudgment interest is allowable if the damage amount is liquidated or unliquidated and determinable by computation with reference to a fixed standard. See Elte, Inc. v. S.S. Mullen, Inc., 469 F.2d 1127 (9th Cir. 1972). The AUM measurement is an accepted standard and is readily ascertainable. The Court will award interest.

4. Interest was determined on an annual rate of 6%.

5. The total damage award of $72,465.78 shall bear interest at the legal rate from date of judgment.

6. The Plaintiffs shall recover their costs.

7. The request for injunctive relief is denied.

JUDGMENT

IT IS ORDERED that judgment is entered in favor of the Plaintiff United States as trustee for the Kalispel Indian Tribe and individual allottees in the amount of $72,465.78 against the Public Utility District #1 together with interest thereon from date of judgment and Plaintiff's costs incurred.

DATED this 6th day of August, 1987.

/s/
RICHARD M. BILBY,
United States District Judge

SCHEDULE A

YEAR	ACREAGE[1]	AUM[2]	AUM/ACRE[3]	GRAZ. VAL.[4]	INTxYRS.[4]	TOTAL
1956	186.07	1.00	1.8	$251.00	15.06x30	=$451.80
1957	186.07	1.08	1.8	$363.66	21.82x29	=$632.77
1958	186.07	1.16	1.8	$388.51	23.31x28	=$652.70
1959	186.07	1.24	1.8	$415.30	24.92x27	=$672.84
1960	186.07	1.33	1.8	$445.45	26.73x26	=$694.90
1961	186.07	1.42	1.8	$475.59	28.53x25	=$713.39
1962	186.07	1.50	1.8	$502.39	30.14x24	=$723.36
1963	186.07	1.75	1.8	$586.12	35.17x23	=$808.85
1964	186.07	2.00	1.8	$669.85	40.19x22	=$884.20
1965	186.07	2.25	1.8	$753.58	45.21x21	=$949.51
1966	186.07	2.50	1.8	$837.32	50.24x20	=$1,004.78
1967	186.07	2.75	1.8	$921.05	55.26x19	=$1,049.98
1968	186.07	3.00	1.8	$1,004.78	60.29x18	=$1,085.52
1969	186.07	3.08	1.8	$1,004.78	60.29x17	=$1,024.94
1970	186.07	3.48	1.8	$1,165.54	69.93x16	=$1,118.92
1971	186.07	3.88	1.8	$1,299.51	77.97x15	=$1,169.56
1972	186.07	4.28	1.8	$1,433.48	86.00x14	=$1,204.00
1973	186.07	4.68	1.8	$1,567.45	94.00x13	=$1,222.61
1974	186.07	5.08	1.8	$1,701.42	102.08x12	=$1,225.02
1975	186.07	5.48	1.8	$1,835.39	110.12x11	=$1,211.36
1976	186.07	5.88	1.8	$1,969.36	118.16x10	=$1,181.62
1977	186.07	6.28	1.8	$2,103.34	126.20x9	=$1,135.80

SCHEDULE A (continued)

1978	186.07	6.68	1.8	$2,237.30	134.24x8	=$1,073.90
1979	186.07	7.08	1.8	$2,371.28	142.28x7	=$995.95
1980	186.07	7.50	1.8	$2,511.95	150.72x6	=$904.30
1981	186.07	7.50	1.8	$2,511.95	150.72x5	=$753.60
1982	186.07	7.50	1.8	$2,511.95	150.72x4	=$602.88
1983	186.07	8.50	1.8	$2,846.87	170.81x3	=$512.44
1984	186.07	9.50	1.8	$3,181.80	190.91x2	=$381.82
1985	186.07	9.50	1.8	$3,181.00	190.91x1	=$190.91
1986	186.07	9.50	1.8	$3,181.00	190.91x0	=$00.00
				$46,321.57	+	$26,234.21

OVERALL TOTAL = $72,465.78

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[1] 186.06 acres stipulated to by counsel
[2] AUM from Plaintiff's Exhibit 1011
[3] AUM per acre from testimony of Dennis Olson
[4] Grazing value and interest total as of 12/31/86

29 FPC 534

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Public Utility District No. 1 of Pend Oreille County, Washington) Project No. 2042

ORDER APPROVING REVISED PROJECT EXHIBITS AND ADJUSTING ANNUAL CHARGES

(Issued March 18, 1963)

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L.J. O'Connor, Jr., and Charles R. Ross

On June 12, 1961, Public Utility District No. 1 of Pend Oreille County, Washington, licensee for major Project No. 2042 [issued, 11 FPC 786 (1952)], filed for Commission approval revised Exhibits K and L. The project, known as the Box Canyon Project, is situated on the Pend Oreille River in the State of Washington, and affects lands of the United States within the Kaniksu and Coleville National Forests.

Commission approval of revised Exhibit L would allow the project to be so operated that the backwater on the Albeni Falls project of the Corps of Engineers, Department of the Army, would be two feet instead of one foot. Commission approval of revised Exhibit K would reflect minor changes in the project boundary to include therein 0.29 acre of lands of the United States affected by the increase in backwater effect in the lower end of the project reservoir, with a resultant increase in the annual charges for the use of such lands.

The licensee states that the proposed changes are necessary and desirable because experience has shown that the original backwater curves do not provide for sufficient head loss through the canyon immediately upstream from the

Box Canyon dam, thus reducing the available head at Box Canyon when maintaining one foot of backwater at Albeni Falls. The licensee stated also that the proposed two feet of backwater at Albeni Falls will provide some additional head over that originally contemplated at Box Canyon dam.

The Secretary of the Army and the Chief of Engineers, have reported that the proposed increase in backwater will have no adverse effect on navigation interest; that additional license terms or conditions in the interest of navigation are not considered necessary; and that the existing agreement between the licensee and the Corps, required by Article 29 of the license, provides for repayment of power loss at Albeni Falls based on the actual backwater experienced during operation, and, therefore, the agreement will not require change because of the proposed increase in backwater.

The Department of Agriculture has advised that the effected Exhibit K, sheet 1 (FPC No. 2042-12), as revised to show the additional lands of the United States to be occupied by the project, is adequate for the protection and utilization of the Coleville National Forest, and there is no objection to Commission approval of the revised exhibit.

The staff has made the changes in the affected Exhibit K and L tracings pursuant to the licensee's authorization in letter dated October 11, 1961.

The Commission finds:

(1) Exhibit K-1 through -5 (FPC No. 2042-12 through -6), as revised, and Exhibit L-5 and -6 (FPC No. 2042-23 and -24), as revised, conform to the Commission's rules and regulations and should be approved as part of the license for the project, and Exhibit K-1 through -5 (FPC No. 2042-12 through - 16) and Exhibit L-5 and -6 (FPC No. 2042-23 and -24) now parts of the license and which have been superseded should be eliminated from the license.

(2) The increased annual charges for recompensing the United States for the use of additional lands of the United

States by the project is reasonable as hereinafter fixed and specified.

The Commission orders:

(A) The revised exhibits described in finding (1) above are hereby approved as part of the license for Project No. 2042, and the exhibits described in the same finding as being superseded are hereby eliminated from the license.

(B) Subparagraph (ii) of the Article 36 of the license, as revised, is further revised to read as follows:

> (ii) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands, $338.26.

(C) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Act, and failure to file such an application shall constitute acceptance of this order. In acknowledgment of the acceptance of this order, it shall be signed for the licensee and returned to the Commission within 60 days from the date of issuance of this order.

By the Commission.

/s/
Joseph H. Gutride,
Secretary.

16 FPC 1008

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of Public Utility District No. 1 of Pend Oreille County, Washington	Project No. 2042

ORDER APPROVING EXHIBIT AND PRESCRIBING ANNUAL CHARGES

October 3, 1956

In compliance with article 38 of its license as modified for project No. 2042, Public Utility District No. 1 of Pend Oreille County, Wash., licensee, filed on August 7 and 10, 1953, revised exhibit F and revised exhibit K (F. P. C. Nos. 2042-12 through 2042-20) showing the project boundary and project area as finally established.

The effect of approving exhibit K will be to establish the area of Government lands partly within Kaniksu and Colville National Forests occupied by the project and to fix and specify the annual charges, not heretofore specified in the license, for such occupancy. Approval of exhibit F is not required under our rules and regulations.

The Commission finds:

(1) The above-described revised exhibit K conforms to the Commission's rules and regulations.

(2) The amount of annual charges hereinafter specified for inclusion in article 36 of the license for the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands is reasonable.

The Commission orders:

(A) The revised exhibit K referred to in finding (1) above is hereby approved as part of the license for project No. 2042.

(B) Paragraph (a) of the February 5, 1952, order issuing the license for project No. 2042 is revised to read as follows:

> (a) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by the licensee or by the United States; the location of such project area and project boundary being more specifically shown and described by certain exhibits which formed part of the application for license or for amendment thereof and which are designated and described as follows:

Exhibit J: (F. P. C. No. 2042-11) General map, filed with the Commission on November 8. 1951.

Exhibit K (revised): Land maps in 9 sheets, sheets 1 through 9, (F. P. C. Nos. 2042-12 through 2042-20) filed with the Commission on August 10, 1953.

(C) Paragraph (ii) of article 36 of the license is revised effective as of February 1, 1952, to read as follows:

> (ii) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands, $337.56.

(D) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided by section 313(a) of the Federal Power Act, and failure to file such an application shall constitute acceptance of this instrument. In acknowledgment of the acceptance of this instrument it shall be signed for the licensee and returned to the Commission within 60 days from the date of issuance of this order.

11 FPC 786

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of Public Utility District No. 1 of Pend Oreille County, Washington	Project No. 2042

ORDER ISSUING LICENSE (MAJOR)

February 5, 1952

Application was filed October 8, 1951, by Public Utility District No. 1 of Pend Oreille County, Newport, Wash., for license under the Federal Power Act (hereinafter referred to as the Act) for proposed major Project No. 2042, known as the Box Canyon project, to be located on the Pend Oreille River in Pend Oreille County, Wash., and Bonner County, Idaho, at a site about three miles north of the town of Ione, Pend Oreille County, Wash., and affecting public lands, lands of the United States within Kaniksu National Forest, and allotted lands within Calispel Indian Reservation.

The Clark Fork River has its source in the Rocky Mountains near Butte, Mont. It follows a northwesterly course to St. Regis, Mont., and then flows eastward 26 miles to the mouth of the Flathead River, its largest tributary, where it resumes its course northwestward to Pend Oreille Lake in Idaho. From Pend Oreille Lake to the Columbia River into which it flows, the stream is called the Pend Oreille River. This stretch flows westward from the lake to the Washington-Idaho line, thence northerly to the international boundary between the United States and the Dominion of Canada. Just north of the boundary, the Pend Oreille River resumes its westward course to its mouth on the Columbia River.

In its December 15, 1936, order authorizing issuance of a license to Pend Oreille Mines & Metals Company for proposed project No. 1393 on the Pend Oreille River at Metaline Falls approximately 8 miles downstream from the proposed Box Canyon project, the Commission found, among other things, that the project is situated along and in a navigable water of the United States.

In its December 15, 1936, order denying an application for license filed by Hugh L. Cooper, of New York City, for proposed project No. 44, known as the Z Canyon project, situated on the Pend Oreille River (Clark Fork) 13 miles downstream from the Box Canyon project, the Commission found, among other things, that the project is located on, across, along, and in, and will affect the navigable capacity of the Clark Fork of the Columbia River, a navigable water of the United States. The application was denied because the applicant failed to make the required showing of his financial ability to construct the project and of a market for the project power.

The proposed project would consist of:

(a) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by the applicant or by the United States; the location of such lands being tentatively shown and described by certain exhibits which formed part of the application for license and which are designated and described as follows:

Exhibit J: (FPC No. 2042-11) a general map entitled "Box Canyon Power Project"

Exhibit K: Land maps in 9 sheets (FPC No. 2042-12 through FPC No. 2042-20), entitled "Box Canyon Project"

--all of the above-described exhibits having been signed on September 28, 1951: Public Utility District No. 1 by John

M. Fountain, Commissioner, Chairman; F.R. Jordan, Commissioner; and F.W. Schwab, Commissioner, Secretary.

(b) Principal structures consisting of:

1. A dam, comprising a spillway gate structure with an over-all length of about 260 feet and containing four split-leaf, vertical lift, fixed wheel gates each 40 feet wide and 69 feet high;

2. A reservoir backing water upstream about 55 miles to the Albeni Falls project of the Corps of Engineers with pondage only, for load factoring purposes whenever the flow of river is below about 20,000 cubic feet per second;

3. A forebay open channel extending about 400 feet downstream along the left bank of the river, with a stop-log ice sluice at the lower end;

4. A powerhouse to contain four vertical turbine-generator units each of 24,500 horsepower at 41-foot net head, and 15,000 kilowatt rated capacity (total 60,000 kilowatt at 0.9 P. F., and 98,000 horsepower);

5. A switchyard containing the necessary switching and transforming equipment; and

6. Miscellaneous structures and facilities.

--the location, nature, and character of which structures are more specifically shown and described by the exhibits hereinbefore cited and by certain other exhibits which formed part of the application for license and which are designated and described as follows:

Exhibit L: Plans in six sheets, signed on September 28, 1951: Public Utility District No. 1, by John M. Fountain, Commissioner, Chairman; F.R. Jordan, Commissioner; and Attest:

F.W. Schwab, Commissioner, Secretary; and entitled:

Sheet 1: (FPC No. 2042-2) "Box Canyon Power Project - General plan."

Sheet 4: (FPC No. 2042-5) "Box Canyon Power Project - Typical sections - Water Conductors."

Sheet 6: (FPC No. 2042-7) "Box Canyon Power Project - Powerhouse - plan & sections - sheet 1."

Sheet 7: (FPC No. 2042-8) "Box Canyon Power Project - Powerhouse - Plan & Sections - Sheet 2."

Sheet 8: (FPC No. 2042-9) "Box Canyon Power Project - One Line Diagram."

Sheet 9: (FPC No. 2042-10) "Box Canyon Power Project - Switch Yard - Plan & Section."

Exhibit M: (in three sheets) entitled "General Description and Specifications of Equipment," signed Public Utility District No. 1 of Pend Oreille County by John M. Fountain, President; E.R. Jordan, Commissioner; and F.W. Schwab, Secretary; and filed with the Commission on December 5, 1951.

(c) All other structures, fixtures, equipment, or facilities used or useful in the construction, operation, and maintenance of the project and located in the project area, including such portable property as may be used or useful in connection with the project whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; also all riparian and other rights, the use or possession of which

is necessary or appropriate in the maintenance or opinion of the project.

The Exhibit K maps referred to in paragraph (a) above are not complete in that the extent to which the project will encroach upon lands of the United States is not presently determinable, and the acreage of land encroached upon by the project works in each subdivision is omitted from the maps. It will be necessary, therefore, for the applicant to resubmit completed Exhibit K maps at a later date for Commission approval as hereinafter provided.

The Commission issued a preliminary permit to the applicant herein for a period of six months, effective as of February 1, 1951, which permit, pursuant to application therefor, was extended to December 31, 1951, by Commission order dated October 2, 1951.

The Acting Chief, Forest Service, acting for the Secretary of Agriculture, who has supervision over the Kaniksu National Forest, the Office of the Chief of Engineers, Department of the Army, and the Acting Secretary of the Interior, have reported on the application.

Numerous informal protests against the application and requests for hearing thereon have been received from owners of farm land and others in the vicinity of the proposed project who allege that:

(1) They have received no assurance from the applicant herein that they will be adequately compensated for any resulting damage;

(2) There is no actual need for additional power in the area;

(3) There is no satisfactory showing of any economic necessity for construction of the project; and

(4) Any benefits derived from the project would not offset resulting flood damage to privately owned property.

In addition to the protests just referred to, a substantial number of individuals as members of the Calispel Indian Tribe have protested informally against the application and requested a hearing thereon alleging probable damage to pasture and hay lands.

Having given full consideration to these protests, it should be noted that:

(1) The Federal Power Act requires, as hereinafter provided, that the licensee shall conform with such rules and regulations as the Commission may prescribe for the protection of life, health, and property, and the licensee shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project - the determination and fixing of such damages being a matter for the local courts of competent jurisdiction to decide when satisfactory settlement cannot be negotiated.

(2) The Pacific Northwest Region has been deficient in dependable capacity to supply the area loads from 1946 to 1951 and will continue to be deficient until 1956, even if all projects now under construction and proposed for construction are constructed and completed on time and probably the said region will not have an ample amount of dependable power supply until 1959 or later.

(3) In letters dated January 3, 1951, and November 26, 1951, the Defense Electric Power Administration urged the Commission to give early and favorable consideration to the Box Canyon project.

(4) In the river channel immediately above the proposed Box Canyon dam and for possibly 24 miles upstream, the water level will be higher than under natural conditions for flows up to about 90,000 cubic feet per second due to the operation of the Box Canyon project, but with the same flows, water levels farther upstream will differ little from natural

conditions. For flows above 90,000 cubic feet per second, the operation of the project will have little if any effect on water levels. In general, damage to privately owned lands will be small but will have to be compensated for by the licensee where it does occur. On the other hand, the project will provide a substantial block of high load factor power in a relatively short time which is badly needed in the Pacific Northwest at low cost which is necessary for the large power-consuming defense industries.

(5) The proposed Box Canyon project is a run-of-river type project with limited pondage. The Pend Oreille River at the Box Canyon project site will be regulated by the Hungry Horse reservoir and Flathead Lake and reregulated in Pend Oreille Lake by the Albeni Falls project now under construction by the U. S. Corps of Engineers. The flow passing the Box Canyon project, therefore, will be virtually equal to that released from the Albeni Falls reservoir.

(6) The Commission's staff has reviewed the report of the Harza Engineering Co. on the project which includes extensive backwater studies made in collaboration with the Corps of Engineers. Streamflow studies indicate that the mean annual flood at the project site is on the order of 90,000 cubic feet per second. The flood of June 1948, was measured by the Corps of Engineers and the United States Geological Survey and the peak discharge was determined to be 168,700 cubic feet per second at Albeni Falls and 171,300 cubic feet per second at "Z" Canyon. Operation of the Box Canyon project contemplates that all spillway gates will be opened when the stream has reached a flow of 90,000 cubic feet per second and natural stream flow conditions will prevail for all flows in excess of this amount. The dam will consist of a deep-gated spillway in the main river channel, adequate in capacity to pass all expected flood flows without reservoir backwater effects.

(7) The proposed plan of operation for the project contemplates that from about July to mid-September the tentative reservoir operating schedule will result in minimum flooding effects on existing productive wild hay lands and that during the ensuing non-growing winter and early spring months operation involving one foot of backwater effect at Albeni Falls will prevail for flows up to 90,000 c.f.s. Operation during the spring and summer flood period may be available but will be such as not to augment either local flooding within the diked areas or the natural hazards of overtapping any of the main dikes along the river.

(8) The applicant proposes to install continuous recorder and station gages at important points in the stream between the Box Canyon dam and Albeni Falls project. In connection with the operation of the reservoir and its relation to flooding in the Calispel Valley, the applicant also proposes to install a continuous recorder gage near the mouth of Calispel Creek at Cusick. These readings will be telemetered to the operating rooms of the Box Canyon powerhouse on a continuous basis. The operation of these gages should provide a reliable means of adhering closely to the proposed operating plan.

(9) A public hearing was held August 28, 1951, in Cusick, Washington, by the applicant herein, Public Utility District No. 1 of Pend Oreille County, Washington, at which hearing the proposed operating plan for the proposed Box Canyon project and its effects on lands adjoining the river were discussed at length by interested persons.

The Commission, having considered the entire record in this proceeding, including all informal protests and requests for hearing on the application, finds:

(1) The Pend Oreille River, at the site of the applicant's proposed project No. 2042, is a navigable waterway

of the United States, and, therefore, construction and operation of the applicant's proposed project will affect the interests of interstate or foreign commerce.

(2) The applicant is a municipal corporation organized under the laws of the State of Washington and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project.

(3) No conflicting application is before the Commission. Public notice has been given.

(4) The applicant has submitted satisfactory evidence of its financial ability to construct and operate the proposed project.

(5) Except to the extent that under certain conditions there will be encroachment on the tailwater at the Albeni Falls Project, the proposed project does not affect any Government dam, nor will the issuance of a license therefor, as hereinafter provided, affect the development of any water resources for public purposes which should be undertaken by the United States itself.

(6) The issuance of license for the project as hereinafter provided will not interfere or be inconsistent with the purposes of any withdrawal of public lands nor with the purposes for which the Kaniksu National Forest was created or acquired.

(7) Under present circumstances and conditions and upon the terms and conditions hereinafter imposed, the project is best adapted to a comprehensive plan for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes.

(8) The installed horsepower capacity of the project hereinafter authorized is 98,000 horsepower, and, except for the period immediately after construction, the applicant proposes to use the power from the project in Pend Oreille County for domestic and industrial purposes. Immediately after construction, the power will be channeled into the defense program, either for aluminum industry or other defense needs, in accordance with the request of Defense Electric Power Administration.

(9) The amount of annual charges to be paid under the license for the purposes of reimbursing the United States for the costs of administration of Part I of the Act, and for recompensing it for the use, occupancy, and enjoyment of its lands is reasonable as hereinafter fixed and specified.

(10) In accordance with section 10(d) of the act, the rate of return upon the net investment in the project, and the proportion of surplus earnings to be paid into and held in amortization reserves, are reasonable as hereinafter specified.

(11) The exhibits designated and described in paragraphs (a) and (b) above conform to the Commission's rules and regulations and should be approved as part of the license for the project.

The Commission orders:

(A) This license is issued to Public Utility District No. 1 of Pend Oreille County, Newport, Washington, under section 4(e) of the Act, for a period of 50 years, effective as of February 1, 1952, for the construction, operation, and maintenance of Project No. 2042 affecting navigable waters and lands of the United States, subject to the terms and conditions of the act which is incorporated by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) This license shall also be subject to the terms and conditions set forth in form L-6 entitled "Terms and Conditions of License for Unconstructed Major Projects Affecting Navigable Waters and Lands of the United States", which terms and conditions, described as articles 1 through 27, are attached hereto and made a part hereof, except for article 12, and subject to the following special conditions set forth herein as additional articles:

Article 28. The licensee shall commence construction of the project within one year from the effective date of the license, shall thereafter in good faith and with due diligence prosecute such construction, and shall complete the project works within two years from beginning of construction.

Article 29. The licensee shall, prior to beginning of operation of the Albeni Falls power plant, enter into an agreement with the Chief of Engineers, Department of the Army, or his designated representative, to compensate the United States for encroachment on the Albeni Falls project resulting from the operation of the Box Canyon project. In the event no satisfactory agreement is concluded by such time, then the Commission shall fix and determine the compensation to be made by the licensee to the United States for such encroachment after notice and opportunity for a hearing.

Article 30. The United States shall not be liable for claims for any damages resulting from releases from the Albeni Falls project into the licensee's reservoir.

Article 31. The licensee shall construct, maintain, and operate such protective devices and comply with such reasonable modification of the project structures and operation in the interest of fish and wildlife resources as may be hereafter prescribed by the Federal Power Commission upon the recommendations of the Washington State

Department of Game, the United States Forest Service, and the Secretary of the Interior.

Article 32. The Licensee agrees that should the project works be damaged or the power output of the project be reduced by subsequent upstream diversion of the waters of the Pend Oreille and Clark Fork Rivers upstream from the Box Canyon site by the United States in connection with its irrigation and conservation program, then the United States shall have the option, in full settlement of any and all claims by the Licensee, of paying such damages as the Licensee shall then be entitled to receive as a matter of law, or of acquiring the Licensee's project in the manner provided by the Act.

Article 33. The project shall be operated by the Licensee in such a manner as not to interfere with or damage Indian land of the Calispel Indian Reservation, or, in case such damage should occur as a result of the operation of the project, the Indians shall be compensated by the Licensee in the manner and amount as determined by the Secretary of the Interior, after consultation with the Calispel Indian Community Council and the Licensee.

Article 34. The Licensee shall clear all lands in the bottom and margin of the reservoir up to high-water level before it is filled and shall dispose of all temporary structures, unused timber, brush, refuse, and inflammable material resulting from the clearing of the lands or from construction of the project works to the satisfaction of the Commission's authorized representative and after the project is placed in operation all trees along the shores of the reservoir which die shall be removed.

Article 35. At such time as the Commission may direct and to the extent that it is economically sound and in the public interest to do so, after notice and

opportunity for hearing, the Licensee shall install an additional generating unit.

Article 36. The Licensee shall pay to the United States the following annual charges:

(i) For the purpose of reimbursing the United States for the costs of administration of Part I of the Act, one cent per horsepower on the authorized installed capacity (98,000 horsepower) plus two and one-half (2½) cents per 1,000 kilowatt-hours of gross energy generated by the project during each calendar year for which the charge is made;

(ii) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands, an amount to be determined by the Commission.

Article 37. The Licensee shall submit, in accordance with the Commission's rules and regulations, Exhibit "L" drawings showing the final design of the proposed spillway structure; and the licensee shall not begin construction of that dam until the Commission shall have approved the drawings.

Article 38. Within one year from the effective date of this license, the Licensee shall revise and submit for Commission approval Exhibits "F" and "K" in accordance with the Commission's rules and regulations.

(C) The exhibits designated and described as Exhibits "J", "L", and "M" in paragraphs (a) and (b) above are approved as part of this license.

(D) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided by section 313(a) of the Act.

(E) This license shall be signed for the Licensee and returned to the Commission within 60 days from date of issuance of this order in testimony of its receipt and acceptance.

By the Commission.

/s/
Leon M. Fuquay,
Secretary.

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
WASHINGTON 25,D.C.

Jan. 18, 1952

Re: Project No. 2042

My Dear Mr. Buchanan:

In a letter of November 6, 1951, the Commission requested the comments of the Department of the Interior on an application for a license for Project No. 2042 filed by Public Utility District No. 1 of Pend Oreille County, Washington; Newport, Washington. In a letter of December 6, the Commission furnished us with revised prints of maps comprising Exhibits "J" and "K" of the application. In a letter of December 12, the Commission transmitted to the Department a copy of Exhibit "M" of the application by which the applicant proposes to install four turbines with a total rated capacity of 98,000 horsepower instead of 83,000 horsepower as had been previously indicated.

Project No. 2042, to be known as the Box Canyon Project, would be located on the Pend Oreille River in Pend Oreille County, Washington, and Bonner County, Idaho. The project works would include a dam about three miles downstream from Ione, Washington. The dam would be a spillway gate structure about 260 feet long with four verticle-lift gates, each 40 feet wide and 69 feet high. The reservoir created by the dam would extend upstream about 55 miles to the Albeni Falls project, authorized for construction by the Corps of Engineers, United States Department of the Army. The Box Canyon project would have an open forebay channel about 400 feet long extending along the left ban of the river. This channel would have a concrete and stop-log ice sluice at the lower end. The project would have a reinforced powerhouse containing four verticle turbine-generator units with a total capacity of 60,000 kilowatts. According to the material transmitted with your letter of December 12, these

units will be able to deliver 69,000 kilowatts. Other facilities of the project would include a switchyard and other miscellaneous structures.

In our letter of August 11, 1950, commenting on the application of Public Utility District No. 1 of Pend Oreille County for a preliminary permit, we pointed out that the project would be incompatible with construction of the Boundary Dam or Z Canyon Dam on the Pend Oreille River by the Federal Government in accordance with comprehensive plans of the Corps of Engineers and the Department of the Interior. We also pointed out in that letter the adverse effect which the Box Canyon project would have on fishery resources of the area. In issuing the preliminary permit the Federal Power Commission directed that the permittee cooperate with State and Federal agencies concerned with the conservation of fish and wildlife resources in the development of the plans for the project. The preliminary permit also directed the permittee, in the development of plans and method of operation of the project, to cooperate with the Department of the Army, which has primary jurisdiction over Federal water resource developments on the Pend Oreille River under the agreement of April 11, 1949, between that Department and the Department of the Interior.

This Department is now glad to endorse the application of Public Utility District No. 1 for a license for Project No. 2042 and to recommend that the license be issued as promptly as possible, subject to the conditions and stipulations recommended in this letter. In view of the continuing need for additional power resources in the Pacific Northwest, it is hoped that Public Utility District No. 1 of Pend Oreille County can construct the project on the fastest possible schedule.

As indicated in our letter to the Commission of August 11, 1950, the Box Canyon project will destroy the fishery value of a highly prized section of the Pend Oreille River, from the project dam upstream to the Albeni Falls project. If the Box Canyon project were not constructed, the present successful fishing for rainbow and cutthroat trout in that

reach of the river might be expected to increase greatly. The project reservoir, on the other hand, will encourage development of trash fish population now limited by the fast-flowing stream. The Box Canyon Reservoir fishery will not be nearly so attractive as the stream fishery destroyed, nor will it be comparable in quality to the numerous natural lakes in the vicinity.

If the reservoir of the Box Canyon project will never exceed an elevation of 2,025 feet above sea level, there will be little damage to wildlife as a result of the construction of the project. If, however, reservoir elevations 10 or more feet higher should occur, a serious loss of wildlife habitat will result from the flooding of the Calispell Flats area near Cusick. These lowlands constitute excellent habitat for deer and upland-game bird.

Unfortunately, no practicable means of avoiding losses to fish and wildlife which will be caused by the construction of the Box Canyon project are immediately apparent. The possibility of developing means and measures for protection of these resources as detailed plans for the project become available, during as well as after construction, should be recognized and means for implementing them assured by inclusion in the license of the general recommendations incorporated in stipulations 1, 2 and 3, presented subsequently in this letter.

The Boundary project of the Corps of Engineers or the Z Canyon project incorporated in this Department's comprehensive plan for the Columbia River Basin would result in greater hydroelectric power production at less cost than the Box Canyon project. It seems clear however that the construction of either of these projects in accordance with preliminary plans which have been developed for them would harm mining activities and mineral resources and that there would be delay in the initiation of construction on either project. In this circumstance, and in light of the need for fast development of new power resources, it is the position of this Department that the Box Canyon project should go ahead even though it might mean the elimination or modification of plans for the Boundary project or the Z Canyon

project when and if either is constructed. Box Canyon's power can be made available to the energy-short Pacific Northwest in a comparative short time in contrast to the long delay in prospect for the fulfillment of indefinite Federal plans for development at that part of the Pend Oreille River.

Nevertheless, the construction of the Box Canyon project ought to be consistent with other phases of Federal plans for beneficial water resource development of the Columbia River Basin. This means that a provision should be incorporated in the license to protect rights to water supply for existing and potential irrigation projects which lie in the basins of the Pend Oreille and Clark Fork Rivers upstream from the Box Canyon site. Otherwise, power-water rights which may be associated with the operation of the Box Canyon project, would have to be purchased for the benefit of upstream irrigation development and other beneficial consumptive uses. This would result in higher cost for these uses. It is therefore requested that stipulation No. 4, subsequently presented in this letter, be incorporated in the license in order to insure that the Box Canyon project will be in harmony with the optimum development of the water resources of the Columbia River Basin.

Plans for the Box Canyon project developed by the applicant provide that the Box Canyon pool will encroach about one foot on the tailwater of the Albeni Falls project. The Applicant estimates that this small encroachment will increase the head of Box Canyon by 7½ or 8 feet. This Department has no objection to this encroachment providing that the United States is compensated for the resulting loss of power at Albeni Falls and that suitable arrangements between the Licensee and the Federal government are made with respect to the net gain in power production. Stipulation No. 5, herein recommended, is intended to cover these points.

The Applicant has recognized that hydraulic and electrical integration of the Box Canyon project with the Federal power system in the Pacific Northwest is essential to the financial feasibility of the project. Accordingly, present plans of the applicant provide for the integration of the Box Canyon plant with existing and proposed Federal power

plants and reservoirs of the Pend Oreille-Clark Fork Rivers and those on the Columbia River, including inter-connection with the Federal transmission system. The applicant realizes that the operations must be based upon releases from Albeni Falls, which in turn are related to operations of the entire river system for maximum power, flood control, and other benefits. It is contemplated that the interchange contract will be entered into by the Licensee and the Bonneville Power Administration of this Department, which would provide for delivery of energy from the Federal system to the Public Utility District No. 1 of Pend Oreille County at such times as the capability of Box Canyon is reduced by low stream flows or spring floods. The contract would also provide for the return of energy to the Federal system at other times or for periodical payment for balances in the exchange account. Provision for these arrangements should be formalized in the license by stipulation No. 6, set forth herein.

The Applicant's plan of operation for Box Canyon includes the use for power production purposes of releases from upstream storage reservoirs constructed by the Federal Government. The Applicant's estimated payments for project benefits due to upstream regulation of the river, as shown in its financial analyses of the project, are substantially less than those estimated by the Bonneville Power Administration and the Bureau of Reclamation.

The power produced at Box Canyon temporarily would be in excess of requirement of service area of Public Utility District No. 1 of Pend Oreille County. An understanding has been reached between the Bonneville Power Administration and the Public Utility District for the use of facilities of the Administration to transmit such temporary excesses of power supply to defense loads in the Region. Existing facilities of the Administration can be made available for this purpose.

The Box Canyon project would be located approximately 30 miles downstream from the Kalispel Indian Reservation in Pend Oreille County. Indian lands and interests on this Reservation will not be adversely affected if backwater from the dam is not allowed to raise the water-surface levels adjacent to Indian lands during flood flows. The spillway gates at Box Canyon should be so operated that the maximum river water surface elevations adjacent to Indian lands will not damage those lands. Stipulation No. 7, as presented in this letter, should be incorporated in the license to effectuate this provision or to provide for adequate compensation to the Indians in case damage is incurred as the result of the Box Canyon operation.

In our letter of August 11, 1950, commenting on the application for a preliminary permit for Project No. 2042, we suggested that the project would adversely affect two limestone deposits. Inasmuch as quarries at these two deposits are idle at the present time, the Department of the Interior does not object to the granting of the license on the grounds of harm to mineral interests.

The records of the Geological Survey of this Department indicate that the construction and operation of the project would not affect adversely the purposes of any withdrawal or classification recommended by the Survey, deposits of coal or other minerals, except the limestone deposits noted in the preceding paragraph, or lands within the known geologic structure of a producing oil or gas field.

Stream-gaging was required under the preliminary permit and supervision of the stream-gaging work was assigned to the Geological Survey. It is assumed that continued supervision by the Survey of this work will be provided for in the license.

Stipulations Recommended

In the light of the considerations set out in this letter, the following stipulations are recommended by the Department of the Interior for incorporation in the license issued to the Public Utility District No. 1 of Pend Oreille County, Washington, by the Federal Power Commission for the construction and operation of Project No. 2042.

1. The entire project area, except for such portions as may be reserved for reasons of safety and efficient operation, shall be open to free use by the public for purposes of fishing, hunting, and other recreational pursuits.

2. Practical and reasonable means of mitigating the losses to fish and wildlife caused by construction and operation of the project, of increasing biological productivity of the area, and of furthering public use of the area for recreational enjoyment shall be devised and developed through cooperation of the Licensee with the Washington State Department of Game, the Forest Service of the U.S. Department of Agriculture, and the Fish and Wildlife Service of the U.S. Department of the Interior.

3. The Licensee shall construct, maintain, and operate such protective devices and comply with such reasonable modification of the project structures and operation in the interest of fish and wildlife resources as may be hereafter prescribed by the Federal Power Commission upon the recommendations of the Washington Department of Game and the Secretary of the Interior.

4. The right of the Licensee to operate the project shall be, as against the United States or any water users organization claiming through the United States, subject to a net depletion of the flow of the Pend Oreille River at the dam site, by reason of subsequent use of the water in the Columbia River Drainage Basin above the dam site by the United States for irrigation or other beneficial

consumptive uses in connection with Reclamation projects hereafter undertaken in the Columbia River Drainage Basin under the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof or supplementary thereto), as follows:

> Beginning with the year 1965, such net depletion to the extent of an aggregate of 70,000 acre-feet during any calendar year may be made without compensation to the Licensee. In determining such net annual depletion, account shall be taken among other things, of the return flows coming from such Reclamation projects.

5. The Licensee shall operate the project so as to encroach upon the tailwater level of the Albeni Falls Project of the United States only by agreement with the Bonneville Power Administration and the Corps of Engineers.

6. The Licensee shall operate the project in electrical and hydraulic integration with the Federal power system of the Pacific Northwest, and shall interconnect the project with the Federal regional transmission system.

7. The project shall be operated by the Licensee in such a manner as not to interfere with or damage Indian land of the Kalispel Indian Reservation, or, in case such damage should occur as a result of the operation of the project, the Indians shall be compensated by the Licensee in manner and amount as determined by the Secretary of the Interior, after consultation with the Kalispel Indian Community Council and the Licensee.

* * *

Subject to the above seven stipulations, the Department of the Interior has no objection to the Issuance of a license for Project No. 2042, and, as previously stated, urges that the license be issued and the project constructed at the earliest possible time.

Sincerely yours,

[R.D. Searles]
/s/
Acting Secretary of the Interior

Hon. Thomas C. Buchanan
Acting Chairman
Federal Power Commission
Washington 25, D.C.

United States Attorney
Eastern District of Washington

851 United States Courthouse
Post Office Box 1494 *509/456-3811*
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February 22, 1988

Mr. Jerry Boyd
Hamblen, Coffin, Brooke, & Miller
1200 Washington Trust Financial Center
Spokane, WA 99204

RE: United States of America et. al., v. Pend Oreille County PUD et. al., C-80-116-JLQ

Dear Mr. Boyd:

Enclosed is a copy of the Transcript Designation and Ordering Form. Please be advised that the United States is not designating any portion of the transcript.

Thank you.

Very truly yours,

JOHN E. LAMP
United States Attorney

[Earl A. Hicks]
/s/
EARL A. HICKS
Assistant United States Attorney

EAH/cm